

MINUTES

**STANDING COMMITTEE ON
THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS**

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, January 6, 2016
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Jennifer Andrus
Judge James Blanch, Chair
Alison Adams-Perlac, Staff
Linda Jones
Judge Brendon McCullagh
Steve Nelson
Jesse Nix
Nathan Phelps
Judge Michael Westfall
Scott Young

EXCUSED

Mark Field
Sandi Johnson
Karen Klucznik
David Perry

1. Welcome

Judge Blanch

Judge Blanch welcomed everyone to the meeting.

Mr. Nelson moved to approve the minutes from the October 2015 and November 2015 meetings. Ms. Jones seconded the motion and it passed unanimously.

2. Drug Offense Instructions

Committee

(a) Firearm Enhancement

Judge Blanch explained that his intern researched the issue of whether there is a mens rea requirement for a firearm enhancement or is it strict liability offense? He stated that federal law contains a similar firearms enhancement, 18 U.S. Code § 924(c), that triggers mandatory minimums when certain offenses are committed. He stated that there are three cases from the Tenth Circuit where the Court approved jury instructions for a firearms enhancement that included the mens rea element.

Judge Blanch stated that Utah’s firearms enhancement statute should satisfy at least the mens rea standard of recklessness. He asked Mr. Nelson for his input because Mr. Nelson has experience prosecuting firearms cases.

Mr. Nelson stated that 18 U.S. Code § 924(c) is different from Utah’s enhancement statute. He stated there is currently litigation regarding party liability with respect to firearms enhancement. He stated that the committee may need to revisit this when litigation is concluded. He stated “recklessly” is a difficult scenario and would not occur often. He stated that intentionally and knowingly would be more applicable.

Judge Blanch stated that because of the Tenth Circuit’s analysis and the Utah Supreme Court’s ruling regarding mens rea in *State v. Barella*, the instruction should include a mens rea element.

The committee proposed this language:

If you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed [Distribution of a [Controlled Substance][Counterfeit Substance]] [Possession of a [Controlled Substance][Counterfeit Substance] with Intent to Distribute], you must decide whether (DEFENDANT’S NAME) used a firearm during the commission of that crime. You cannot find that [he][she] used a firearm during the commission of the crime unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. [Intentionally][knowingly][recklessly] used, carried, or possessed a firearm on his person or in his immediate possession during the commission or in furtherance of [distributing a [controlled substance][counterfeit substance]] [possessing a [controlled substance][counterfeit substance] with the intent distribute]

References

Utah Code § 58-37-8(1)(c)

Judge McCullagh moved to approve the instruction. Mr. Phelps seconded the motion and it passed unanimously.

(b) Mere Presence

Mr. Young suggested removing “standing alone.” Ms. Jones agreed. Professor Andrus suggested “on its own.”

Judge Blanch asked the committee if this instruction was necessary and committee members agreed it was necessary.

Ms. Jones suggested titling the instruction, “MERE PRESENCE IS INSUFFICIENT.”

Judge McCullagh asked whether the committee should use “found” or “located.” Professor Andrus suggested using “place” because “location” may refer to a small location, such as a backpack, where a person could not either be located or found.

The committee proposed the following language:

The defendant's mere presence at the place where the [controlled substance][counterfeit substance][paraphernalia] is located is not sufficient on its own to prove that the defendant was in possession of the [controlled substance][counterfeit substance][paraphernalia].

Judge McCullagh moved to approve the instruction. Professor Andrus seconded the motion and it passed unanimously.

(c) Special Enhancements

Judge McCullagh suggested removing "beyond a reasonable doubt" because it is unnecessary for enhancement instructions. He stated that because the jury previously found the defendant guilty, the language should be "having found the defendant guilty."

Judge Blanch referenced the enhancement language for sex offenses and stated that this instruction should be patterned after the sex offenses to maintain consistency. Ms. Adams-Perlac stated that the committee already passed enhancement instructions that excluded "beyond a reasonable doubt" for the reasons articulated by Judge McCullagh. Judge Blanch stated that the procedural safeguards are satisfied if an enhancement instruction is used after the jury has made a determination of guilt beyond a reasonable doubt.

Judge Blanch stated that if this instruction is part of the original packet that jurors receive, the instruction should not include language that assumes guilt. Judge McCullagh stated that this instruction would only be used if the jury found the defendant guilty. Mr. Adams-Perlac asked if bifurcation is the best way to handle this situation.

Judge Blanch stated that if there is a reasonable chance that jurors will receive this instruction for their initial deliberation, the instruction should include conditional language like "if you found." Mr. Nelson stated that he has tried cases and never bifurcated the issue, but agreed that conditional language would be better because these cases are usually not bifurcated.

Judge McCullagh suggested using a special verdict form instead of this instruction. Judge Blanch stated that a special verdict form would not be read to the jury unless the jury found the defendant guilty.

Judge Westfall stated that the jury would only use this instruction if the defendant was found guilty. He suggested, "If you have found..."

Ms. Jones suggested an introductory sentence of "You should consider this instruction only if you have found..." Judge McCullagh suggested an introductory sentence that is not part of the substance of the instruction. Mr. Nelson suggested using, "Only use the following instruction and special verdict form..."

Judge Westfall asked the committee if unanimity is required for special circumstances. Ms. Jones answered that unanimity is required for the circumstance that the jury chooses. Judge Westfall asked if a case exists that confirms this. Ms. Jones answered *State v. Saunders*.

Judge Blanch asked what a jury would do if they cannot unanimously agree on the circumstance. The committee could not determine whether unanimity was required for not finding these circumstances.

Ms. Jones asked what the committee should do if there is not a Utah case on point. Judge Blanch stated that a committee note, explaining the best approach, would be appropriate.

Ms. Adams-Perlac stated that she would research the issue and report back to the committee.

3. Adjourn

Committee

The meeting was adjourned at 1:19 p.m. The next meeting is Wednesday, February 3, 2016.